Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

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VOLUME V

Pages 395 - 500

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART Co., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	NO. C-222472 DEFENDANT F. M. COCKE'S REPLY TO PLAINTIFF BUYERS' RESPONSE OF OCTOBER 12, 1972 AND TRANSAMERICA'S RESPONSE OF OCTOBER 24, 1972 TO F. M. COCKE'S MOTION TO VACATE (The Summary Judgments in Favor of Transamerica and Buyers) Filed: November 7, 1972

INASMUCH AS Plaintiff Buyers have now moved the Court to enter its order denying defendant F. M. Cocke's Motion to Vacate the separate summary judgment of November 10, 1970, in favor of Transamerica, and Transamerica has filed its Response to F. M. Cocke's Motion to Vacate the separate summary judgment of September 29, 1972, in favor of Buyers, and states

that the issues sought to be raised by F. M. Cocke's Motion are "without question res judicata," F. M. Cocke replies herein to Buyers' Response filed October 12, 1972, and to Transamerica's Response filed October 24, 1972.

In his Motion to Vacate, F. M. Cocke points out that Buyers' failure to join the escrow agent, in Buyers' Complaint For Specific Performance of the escrow agreement, left the Court without jurisdiction over the subject matter of such complaint, requiring its dismissal under Rule of Civil Procedure 12(i)3, as amended. Transamerica now claims that it is res judicata that the Court had jurisdiction over Buyers' Complaint, in Transamerica's absence.

The Motion to Vacate also points out that both of the separate summary judgments violate Rules 19(a), 19(c), 13(i), and 56d, and also violate the well settled rule of law that a court cannot rewrite a contract but must enforce it as written or not at all. The Motion to Vacate also states that the judgment of September 29, 1972, for damages, is in conflict with Rule 52(a), and that the judgment of November 10, 1970, was premature.

As stated in 6 Moore's Federal Practice, Section 54.34(2-2), Multiple Parties Actions after the 1961 Amendment to 54(b), at page 563:

> The trial court cannot by certification make final and appealable a ruling that is not final and appealable under 28 USC 1291. Sears, Roebuck & Co. v. Mackey (1956) 351 US 427, 437, 76 S.Ct. 895, 901, 100 L.ed 1297, 1307,

> 22 FR Serv 54b.4, Case 6, citing Treatise; Hamman v. United States (CA9th, 1968) 399 F.2d 673, 674. . . .

See ARS Section 12-2101, as amended.

In Caruso v. Superior Court, Pima County (1966) 100 Ariz. 167, 412 P.2d 463 (headnote 6):

> Acts in excess of a court's jurisdiction for which a writ of prohibition might issue include acts exceeding the power of a court as defined by the Constitution, statute or court rules followed under the doctrine of stare decisis, and acts where the lower tribunal has abused its discretion.

In Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 US 603, 19 S.Ct. 761, 43 L.ed 1103, the court said (L.ed, p. 1105):

> As was said in Thompson v. Hatch, 3 Pick. 512:
>
> A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. . . .The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases

> which come within it, until it is repealed by the authority which made it.

Where the question of jurisdiction is one of law, a court cannot by an erroneous decision acquire jurisdiction which it has not, or divest itself of jurisdiction which it has. Risley v. Phoenix Bank, 83 NY 318, 38 Am.R. 421, aff. 111 US 125, 28 L.ed 374.

THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

In Barbier v. Connolly, 113 US 27, 28 L.ed 923, 5 S.Ct. 357, the court said:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts;
> . . .

In Northern Pac. Ry. Co. v. Kurtzman (1897) 82 F. 241, the court said:

> I recognize the absolute correctness of the proposition that the federal courts are forbidden by express provisions in the laws enacted by congress to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the federal court is a direct attack upon a judgment rendered in a state court for the purpose of nullifying such judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers, the circuit courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. Galpin v. Page, 18 Wall. 351-375; Pennoyer v. Neff, 95 U.S. 714-748; Arrowsmith v. Gleason, 129 U.S. 86-101, 9 Sup. Ct. 237; Marshall v. Holmes, 141 U.S. 589-601, 12 Sup. Ct. 62.

In Earle v. McVeigh, 91 U.S. 503, 23 L.ed 398, the court said:

> Want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under the judgment, since want of jurisdiction makes the judgment utterly void and unavailable for any purpose.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S.Ct. 236, the court pointed out that where it appears from the record that the court was without jurisdiction, the action of the court is void, and that no judgment of a court is due process of law, if rendered without jurisdiction in the court.

Since it is well settled that the federal courts have the last word on federal questions, such as due process of law and equal protection of the laws, it cannot now be established that the issues raised in C-222472 by F. M. Cocke are res judicata as claimed by Transamerica.

Accordingly, defendant F. M. Cocke again urges the Court to vacate the two judgments, for want of jurisdiction.

Respectfully submitted this 7th day of November, 1972.

By /s/ L. Alton Riggs, Jr.
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Attorney for Defendant
F. M. Cocke

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Appellees and Cross-Appellants.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY SUPERIOR COURT NO. C-222472
FRANCIS M. COCKE, Appellant, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	APPELLANT F. M. COCKE'S REPLY TO APPELLEES' MOTION TO DISMISS Filed: March 12, 1973

By way of Reply to the Motion To Dismiss Appeal filed March 7, 1973 by Appellees Horne and James Stewart Co., F. M. Cocke respectfully submits the following:

The crux of the matter reached by appellees at page 3, lines 10 and 11, and again at page 4, lines 27-31, of their Motion to Dismiss, is whether a motion to

vacate qualifies as a motion to alter or amend, under Arizona's present Rule 59(l).

It appears that none of the cases cited by appellees are in point on this first issue. Their statement at page 4, lines 2-4, apparently attributed to the discussion in Ohio Fuel Gas of the distinction between a "vacated" and a "suspended" judgment, should not be interpreted to say that it is the motion which has utterly no effect for reason thereof.

Arizona adopted as Rule 59(l) the present Federal Rule 59(e), and Moore's Federal Practice discusses the point at issue here at page 3880 of Volume 6A:

> Although the motion under (e) is to "alter or amend" the judgment, it would perhaps be more accurate to say that subdivision (e) deals with motions to alter, amend, or vacate. It would be an unreasonably narrow position to hold that a judgment may be modified and amended only up to the thin line where it amounts to a vacation of the judgment altogether. The district court formerly had the inherent power to vacate any of its judgments during term time. The Rules were merely intended to abrogate term time as having any effect on the power of the district court over its final judgments; not to withdraw power which it formerly had to vacate a final judgment, but to require that any action of this kind must be taken in response to a proper motion made not later than 10 days from the entry of the judgment or, if the court acts on its

> own initiative, that it do so not later than 10 days after the entry of the judgment. The cases have wisely recognized the power of the court to vacate and set aside a judgment under 59(e).
>
> After the court has ruled on a 59(e) motion, it should not thereafter reconsider that ruling on a motion made later than 10 days after the entry of judgment.

At page 3, lines 12-18, of their Motion, appellees raise a second issue by seeking to establish that F. M. Cocke's Motion to Vacate contained no defense on the merits, but raised only jurisdictional issues, in each and every paragraph.

It has long been the rule in both state and federal courts in suits to vacate a judgment for want of jurisdiction, usually filed when some benefit is claimed thereunder, that the complainant must show that under the facts as alleged he is entitled to substantial relief, in order that the court's time will not be wasted. It appears that the Motion To Vacate asserts several valid defenses, and recites undisputed facts to support them. A copy of the Motion [filed Oct. 10, 1972 (A.)] is attached hereto.

As part of the agreement the enforcement of which is the subject matter of this litigation, the Motion quotes, among others, cancellation paragraphs 16, 17 and 18 (pages 2 and 3), with emphasis on the mandatory and self-executing clause "these instructions shall become cancelled" in 18. Beginning at page 5, line 11, the Motion recites the filing, as provided by paragraph

16, of F. M. Cocke's 13-day notice of intention to cancel upon Buyers' (Appellees Horne and the Company) continued failure to comply, lists their new demands and points to their subsequent affirmance thereof, asserts that they did not even attempt to comply within the 13 days, that they have never retracted their new demands, and that their insistence that the new demands be met as a condition to close of escrow constituted, without more, repudiation of the agreement.

At page 4, the Motion to Vacate quotes cancellation paragraph 24, with emphasis on the mandatory clause "all documents executed by one party only on deposit with the Escrow Agent shall be returned." Under paragraph 24 return of the deeds as documents executed by one party only, instead of delivery to Buyer, is mandatory in the event of the escrow agent's inability or unwillingness to comply with the escrow instructions, for any reason other than previous cancellation under paragraph 18. Obviously, Seller and Buyer here delegated to Transamerica, and it assumed, the right and duty as escrow agent to comply with the escrow instructions only upon the express condition that if it failed to comply, either because it was unable or unwilling, the failure put an end to the mutual rights and obligations of Seller and Buyer under the agreement, Transamerica would collect its charges, and any extra money and the deeds would be returned. The agreement itself, so cancelled, would be retained. The end of the agreement upon noncompliance by the escrow agent is independent of compliance or noncompliance by Seller or Buyer, and requires no notice or demand to or by any party. Unwillingness of Transamerica as title insurer to issue any of

the title policies puts an end to the agreement in the same manner as its failure as escrow agent to comply with the instructions.

At page 6, lines 6-9, immediately below Item 5 of the list of Buyers' new demands, the Motion To Vacate recites the undisputed fact that by letter of March 10, 1969, the escrow agent gave written notice to Sellers that Buyer had done everything required of him to close the escrow. Obviously, the escrow agent had chosen to follow Buyers' new instructions, in violation of the agreement and escrow instructions in the escrow agent's file since October 9, 1968 (page 1 of Motion). This notice was a second attempt by the escrow agent to secure a deed to Parcels 1A and 2A for the Buyers, the first having failed five days earlier, as recited beginning at page 4, line 20, of the Motion, and clearly established its inability or unwillingness to comply with the escrow instructions.

In Secrist v. State of Arizona (1965) 2 Ariz. App. 240, 407 P.2d 781, this Court held that a motion filed on 27 April, 1959, by the Attorney General of Arizona, to vacate on jurisdictional grounds adverse judgment entered 2 July, 1947, and which motion also asserted a valid defense, was a valid motion, and its denial appealable within the meaning of Rule 73(b), Rules of Civil Procedure, and Section 12-2101 A.R.S. (the Section 21-1702 A.C.A.). However, the State having failed to appeal the order denying its motion, the judgment of 2 July, 1947, was held res adjudicata as to the parties thereto.

It appears that appellees' Motion To Dismiss should be denied.

Respectfully submitted this
12th day of March, 1973.

By /s/ L. Alton Riggs, Jr.
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FRANCIS M. COCKE

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C-222472
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	O-R-D-E-R Filed: May 17, 1973

The motion to dismiss of appellees Horne and James Stewart Co. and the reply thereto by appellant Francis M. Cocke have been considered by Judges Donofrio, Ogg and Stevens. This does not constitute a permanent assignment of this appeal to these Judges, to this Department, or to this Division of the Court of Appeals. It appearing to the Court that the appellant's notice of appeal from the

judgments and orders as to appellees Horne and James Stewart Co. is untimely,

IT IS ORDERED dismissing appellant's appeal in its entirety as to appellees Horne and James Stewart Co.

In light of the above order, the motion of appellees Horne and James Stewart Co. for an extension of time to file the answering brief is mooted.

/s/ Francis J. Donofrio
FRANCIS J. DONOFRIO,
Presiding Judge, Department A

COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY Superior Court No. C-222472 F. M. COCKE'S REPLY TO TRANSAMERICA'S MOTION TO DISMISS APPEAL AS TO TRANSAMERICA Filed: June 4, 1973

As his reply to Transamerica's Motion To Dismiss, appellant F. M. Cocke submits the following:

It should not be overlooked that the trial court refused to recognize the existence of the cancellation paragraphs 16-22 and 24 contained in the fine print portion of the escrow agreement, nor did it see fit to recognize the existence of the documents and new demands contained in Buyers' letter to the escrow agent dated March 5, 1969. The effect of the cancellation provisions, when considered

along with Buyers' letter and with the escrow agent's letter of March 10, 1969, which notified Sellers that by deposit into escrow of Buyers' documents and new demands Buyers had done everything required of them to close the escrow, is decisive of this case. This issue has been repeatedly raised by F. M. Cocke during the four years that the enforcement of the agreement has been before the courts. However, the judges earlier involved in the case have so far not made a direct ruling on this decisive issue. A copy of the agreement is in Volume XII of the Abstract, Folio II; copies of the escrow agent's and Buyers' letters are in Folio IV. The documents and demand contained in Buyers' letter are discussed in appellant's Opening Brief, beginning at page 16. The Brief is attacked in the Motion To Dismiss, particularly beginning at page 7, line 28, so permitting appropriate rebuttal by appellant.

In the Motion To Dismiss, Transamerica, even in its claim of violation of Supreme Court Rule 5(b) (discussed below), has reached for its principal support to the very judgments of the trial court, and the decision of the Court of Appeals, the validity of which is challenged by the appeal.

Beginning at the top of page 7, under the heading "Res Judicata," Transamerica states that it has been unable to uncover a single contention relating to Transamerica which has not or could not have been specifically raised in the previous appeal, and quotes the seven questions framed by the Court in that case, which were substituted for the questions presented by the opening brief. The actual

questions presented were as follows:

1. Whether the escrow officer's notice on Mar. 10, 1969, to all parties to the escrow that Buyer had done everything required of him to close the escrow constituted breach of trust and breach of the escrow agreement.

2. Whether the note and mortgage were actually delivered into escrow by F. M. Cocke, and whether the escrow could close without its return or a cash deposit to replace the extra $20,000 represented by the note and mortgage.

3. Whether Transamerica's claim, that F. M. Cocke lost title to the triangle by reason of the Starley quit-claim deed, was valid.

4. Whether Buyers repudiated the contract for sale and purchase, so terminating or cancelling the escrow, by their attempt to secure F. M. Cocke's signature to the warranty deed to land not part of any contract and to which he did not have title, and by their instruction demanding that such deed be signed as a condition to going ahead with the purchase contract.

5. Whether the escrow was cancelled by Mar. 20, 1969, in accordance with the notices of intention to cancel and paragraphs 7, 16-23, and 25 of the escrow instructions by failure of Buyers or Transamerica to comply with the escrow instructions.

6. The effect of paragraph 24 in the event of inability or unwillingness of escrow agent to comply with escrow instructions, or unwillingness of Transamerica to issue its title policy.

7. Whether Transamerica incurred liability by its failure to return either prior to or upon the filing of Buyers' Complaint on April 22, 1969, the deeds and releases held in escrow, and the amount of any such liability.

8. The question of (1) the force of paragraphs 8, 9, and 10 upon and subsequent to any breach of trust or of the escrow agreement by escrow agent, (2) their effect upon and subsequent to the filing of Buyers' Complaint, and (3) their force and effect as affected by public policy.

(emphasis added)

As can readily be determined by comparison with the seven questions quoted by Transamerica at page 7, the underlined portions of the eight actual questions presented for review were omitted.

In the first question actually presented for review, the portion deleted was whether the escrow officer's notice of Buyers' compliance constituted breach of the escrow agreement, or escrow instructions. Question 6, concerning the effect of paragraph 24 in the event of the inability or unwillingness of the escrow agent to comply with the escrow instructions, or the unwillingness of

Transamerica to issue its title policy, was deleted in its entirety. The decisive issue of whether the escrow agent's notice of Buyers' compliance put an end to the agreement under paragraph 24 by establishing the escrow agent's inability or unwillingness to comply with the instructions was thus not met.

Through its deletion of the underlined portion of Question 2 the Court failed to meet the issue of whether the escrow could close without the return of the $40,000 note and mortgage or a cash deposit of the extra $20,000 represented thereby. This $20,000 was a substantial part of the $84,000 deficiency in Buyers' mortgages, which they insisted, and still insist, be placed of record along with the deeds to Buyers before the other $64,000 of the deficiency is corrected or paid. Buyers instructed the escrow agent in their letter dated March 5, 1969, that the $64,000 was not to be paid at all unless and until the deeds included deeds to Parcels 1A and 2A. These parcels were not included in the agreement, or in any other agreement.

Question 3 concerned the small Triangle of land in F. M. Cocke's Parcel 2. In his Statement of the Case (page 13 of the 1971 Opening Brief) he pointed to the undisputed fact that Transamerica refused to insure title to Parcel 2 on its claim that Cocke was divested of title to the Triangle by a neighbor's quit-claim deed. In his argument on Question 3 such claim was effectively rebutted. Transamerica's unwillingness to insure the title, especially since not justified, obviously put an end to the agreement under paragraph 24, but by the deletion of Question 3

this issue was not met, Question 6 being also omitted.

The issue of whether Buyers repudiated the contract by their attempt to secure and their written demand for deeds to the extra land, and the issue of whether the agreement was cancelled by Buyers' failure to comply with the instructions, were raised by Questions 4 and 5. Both of these questions were omitted, and neither of the issues was met.

Question 8(1) raised the issue of whether paragraphs 8, 9 and 10 could be enforced upon and subsequent to any breach of the escrow agreement by the escrow agent. By the omission of Question 8(1), and the omission of Questions 4, 5 and 6, the issue of whether paragraphs 8, 9 and 10 could be enforced <u>after</u> the entire agreement was repudiated, or cancelled under paragraphs 16-22, or cancelled under paragraph 24, was not met.

From the above, and from an examination of the reported decision in Cocke v. Transamerica, 1972, it is manifest that the issues upon which the present appeal is based were not ruled on in that decision, and are not res judicata.

In support of Transamerica's position that the attorney fees were properly collected by the enforcement of paragraphs 8, 9 and 10 without regard to other provisions of the agreement, the Memorandum at page 2, line 9, states that the contentions contained in F. M. Cocke's Response to Transamerica's Motion to Modify Judgment (Abstract, p. 895) <u>have been fully</u> disposed of by the written opinion in Cocke v. Transamerica, 1972.

The Response among other things pointed out that Transamerica was back in the trial court seeking final enforcement of only paragraphs 8, 9 and 10 of the lengthy agreement; that the rest of the agreement, including the cancellation provisions, had not been effectively deleted by either the trial or appellate courts, since that was beyond their jurisdiction; that want of jurisdiction may always be set up against a judgment when sought to be enforced; that jurisdiction of an appellate court on review is limited to correcting the error of the trial court in entertaining the action where without jurisdiction; and that no judgment of a court is due process of law if rendered without jurisdiction.

The Response further stated that the escrow agreement still stood as agreed to by Sellers, Buyers and Transamerica, along with the other provisions and instructions, and that the escrow agent was still bound to Buyers and Sellers to either close the escrow and deliver the deeds and title policies to Buyers, or cancel the escrow and return Sellers' deeds. The Response also stated that the trial court had granted specific performance, and that specific performance must include performance by the escrow agent of its duty to close or cancel the escrow. It was further pointed out that to enforce performance by the escrow agent the court must have jurisdiction over it, and that without such jurisdiction the court would be left without the power to grant the relief sought by Buyers' Complaint, so requiring its dismissal under Rule 12(i)3, as amended.

The Response also pointed out that Transamerica's Motion was premature, and

that it should have awaited a final judgment which specified whether the escrow agent was to close or cancel the escrow, with findings of fact and conclusions of law as to whether or not the documents and demands contained in Buyers' letter dated March 5, 1969, constituted compliance by Buyers.

Clearly, in the present circumstances of this case, these contentions will not be "fully disposed of" in the manner claimed and hoped for by Transamerica unless and until it is established that the trial court had jurisdiction to erase the cancellation provisions from the agreement, and to erase Buyers' new demands, and the escrow agent's letter approving such demands, from the record. Certainly, they were not disposed of by Cocke v. Transamerica, 1972, since the issues raised by such contentions were not met, even if raised, in that earlier decision.

At page 4, line 13, the Memorandum states that in the Response as well as in the present Opening Brief, Cocke continues to assert that the Court cannot enforce one provision of the contract without enforcing all of the provisions, even though they are not involved in the litigation.

It is true that Cocke has asserted, and will continue to assert, that paragraphs 8, 9 and 10 became unenforceable in March, 1969, at least three months before Transamerica incurred any attorney fees, since such paragraphs were cancelled along with the rest of the agreement by repudiation, by cancellation under paragraphs 16-22, or by cancellation under paragraph 24. Transamerica's claim that

the cancellation provisions are not involved in this litigation, in view of the undisputed fact of Buyers' new demands and the undisputed fact of the escrow agent's approval thereof, is without foundation.

At page 4, lines 18-20, of the Memorandum, Transamerica challenges statements made in the present Opening Brief at page 34. These statements are:

> In these circumstances, it became obvious four years ago that a final determination binding on F. M. Cocke and Buyers, of whether it was solely Buyers' failure to retract their new demands that put an end to the agreement by cancellation under paragraph 18 or by repudiation, could not be made in the absence of Transamerica, inasmuch as such cancellation or repudiation did not take place before March 18, 1969, and the escrow agent's letter approving Buyers' new demands was written March 10th.
>
> It was equally obvious that a final determination binding on F. M. Cocke and Transamerica, of whether Transamerica put an end under paragraph 24 to Buyers' rights under the agreement by the escrow agent's letter of March 10, 1969, could not be made in the absence of Buyers.

It is elemental that Buyers would not be bound by a judicial determination to which they were not parties.

At page 5, lines 10 and 11, of the Memorandum, Transamerica attributes its own statements to page 2 of the present Opening Brief. The statements of which Transamerica complains begin at the bottom of page 1 of the Brief:

> The agreement is still in the executory stage. Transamerica has remained unable or unwilling to return the deeds and money to depositors in accordance with the escrow instructions agreed to by all parties, and also has remained unwilling to issue its title policies, close the escrow, and deliver the deeds and money in accordance with five new written demands received from Buyers on March 7, 1969. Title to Parcel 2, about 72 acres, and an undivided half-interest in Parcel 1, containing about 49 acres, still remains in F. M. Cocke, who is in possession of and farming both parcels. Title to the other half-interest in Parcel 1 remains in First National Bank of Arizona, Trustee. Joan H. Cocke is merely life tenant of the trust; the three Cocke daughters are the remaindermen. Unless it can be established that some court had or has the power to alter the terms of deposit into escrow of the trustee Bank's deed, which terms include Schedule A and the fine print Cancellation paragraphs 16-22 and 24, it appears that the long-litigated question of whether the life tenant is entitled to the proceeds is moot. There are to be no proceeds because such terms

> of deposit, unless successfully altered as attempted, plainly require that the Bank's deed be returned to it.

Transamerica long ago admitted that the proposed payment to Joan H. Cocke would violate the trustee Bank's escrow instructions (Kavanaugh Deposition, cross-examination by Transamerica's counsel, Feb. 27, 1970), and this Court in Higgins v. Kittleson (1965) 1 Ariz. App. 244, 401 P.2d 412, pointed out:

> The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).
>
> (emphasis added)

At page 2 of the Memorandum, Transamerica alleges failure of the Statement of Facts to comply with Rule 5(b). As its principal objection Transamerica, at lines 21-25, states:

> In fact, the two separate and distinct actions are again so intertwined and intermixed that it is exceedingly difficult, if not impossible, to ferret out the portions apparently applicable to Transamerica.

The escrow agreement itself establishes that it was Transamerica's own fine print cancellation provisions, particularly paragraph 24, which intertwined and intermixed the rights and obligations of F. M. Cocke, Buyers, the escrow agent and the title insurer. The reservation to the escrow agent and to the title insurer of the right to put an end to the agreement at will took Transamerica as escrow agent out of the traditional role of a passive and disinterested stakeholder.

Claiming a second failure to comply with Rule 5(b), beginning at page 2, line 26, of the Memorandum, Transamerica states that the Questions for Review are likewise defective. At the top of page 3 of its Memorandum, Transamerica designates "The Effect of the Cancellation Provisions" as a second Question for Review, and designates "Due Process of Law as Specified by the Rules of Procedure" as a third question. At page 3, line 6, Transamerica states:

> Hence, the mere statement of the questions drafted by appellant show their total inadequacy to advise the Court of the issues involved.

However, the first quoted phrase is a heading for argument asserting the effect of the cancellation provisions, and the

second is a heading for argument asserting violation of due process of law as specified by the Rules of Procedure.

Upon the foregoing, it is respectfully submitted that Transamerica has failed to show a material failure to comply with Rule 5(b), Rules of the Supreme Court, so as to warrant dismissal, has failed to establish that the appeal in any of its aspects is frivolous, and has failed to establish that the issues upon which the appeal is based are res judicata.

In accord with the inclination of the courts to now relax to some extent the formalities of pleading, and go to the merits, in Preston v. Denkins (1963) 94 Ariz. 214, 382 P.2d 686, the Arizona Supreme Court, sitting en banc, in a unanimous decision held that the right to challenge a judgment on the ground that it is void for lack of jurisdiction of the parties does not depend upon rules of court or statute, that a judgment void for lack of jurisdiction may be set aside by means of a motion to vacate, and that an order setting aside an entire judgment as void does not leave the judgment valid as against defendants not properly before the court on the motion to vacate.

Respectfully submitted this
4th day of June, 1973.

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY Superior Court No. C-222472 APPELLANT F. M. COCKE'S REPLY TO APPELLEE'S MOTION TO REFER FILE BACK TO TRIAL COURT

Filed: September 13, 1973

Appellant F. M. Cocke respectfully submits the following as his Reply to the Motion of Appellees James Stewart Company, M. Seth Horne and Maurine D. Horne for an order referring the file back to the trial court, insofar as it pertains to said Appellees, hereinafter called the "Buyers."

As Buyers themselves state at page 2 of their Memorandum, lines 6-10, they seek an order referring the file in this case,

insofar as it pertains to them, back to the trial court in order that they may seek the affirmative assistance of that court in the enforcement of the judgment entered September 27, 1972. However, it appears that Buyers have already sought and received assistance.

Attached hereto is a copy of an Order To Show Cause, signed by trial court Judge Irvin Cantor on September 7, 1973. and addressed to Transamerica Title Insurance Company of Arizona, Appellee herein. The Order was issued pursuant to Buyers' Application therefor of even date, a copy of which is also attached, with all Exhibits.

MEMORANDUM

I.

COMPLIANCE BY TRANSAMERICA WITH JUDGMENT ENTERED SEPTEMBER 27, 1972

1. STATEMENT OF FACTS

At page 1, lines 27-30, the Order To Show Cause orders Transamerica to appear on September 14, 1973, and show cause:

WHY TRANSAMERICA SHOULD NOT BE ORDERED TO COMPLY WITH THE JUDGMENT ENTERED BY THE TRIAL COURT ON SEPTEMBER 27, 1972.

The judgment entered on September 27, 1972, is a summary judgment, except as to the amount of damages awarded to Buyers for claimed delay, and is the judgment entered in favor of Buyers on their Complaint For Specific Performance of the escrow agreement. The filing of such Complaint in April, 1969, marked the

beginning of this extended litigation.

Although Buyers' Complaint (p. 1 of Abstract) sought at least partial performance by Transamerica both as title insurer and as escrow agent, by demanding as part of the relief sought that the title insurance policies be issued and the escrow be ordered closed, Transamerica has never been joined in Buyers' action. Buyers' Complaint named only the Sellers as defendants, and their action was prosecuted against only Seller F. M. Cocke. The judgment entered September 27, 1972, was entered against only F. M. Cocke.

Transamerica was brought into the case as an additional defendant on F. M. Cocke's compulsory Counterclaim, which he filed along with his Answer to Buyers' Complaint. The Counterclaim, brought jointly and severally against Buyers and Transamerica, sought the return by the escrow agent of Sellers' deeds by the enforcement of cancellation paragraphs 16-22 and 24 of the fine print portion of Transamerica's printed escrow form. A copy of the agreement is in Volume XII of the Abstract, Folio II, and consists of fourteen legal-size, fold-out pages. Transamerica's fine print escrow instructions have been retyped to legible size.

2. TRANSAMERICA IS A REAL PARTY IN INTEREST

Sellers' and Buyers' delegation, by paragraph 24 of Transamerica's fine print escrow instructions, to Transamerica as escrow agent and as title insurer of the power to put an end to the agreement at will, independent of compliance or non-compliance by Sellers or Buyers, took

Transamerica as escrow agent out of the traditional role of a passive and disinterested stakeholder, and made it not only a real party in interest but actually the dominant party to the escrow contract. It was long ago established that any person materially involved in the subject matter of an action is a real party in interest, and unless joined in the action cannot be bound by the judgment. Mosher v. Hiner (1945) 62 Ariz. 110, 154 P.2d 372, certiorari denied 325 U.S. 874, 89 L.ed. 1992, 65 S.Ct. 1554. Even though Buyers have sought to impose on F. M. Cocke duties which Buyers and Sellers together delegated to Transamerica, such as issuing of the title policies and closing the escrow, the subject matter of Buyers' action for specific performance of the escrow agreement was and is plainly the enforcement of its applicable provisions. In view of the fact that the escrow agent remains in possession of Sellers' documents and Buyers' money, and is liable for damage suffered by either by reason of any failure on its part to comply with the escrow instructions, it cannot be effectively denied that Transamerica was and is a real party in interest to such enforcement, particularly of fine print paragraphs 16-22 and 24, and cannot be bound by the September 27, 1972, judgment against F. M. Cocke, since it was not joined in Buyers' action.

II.

LACK OF TRIAL COURT'S JURISDICTION OVER MATTERS CONNECTED WITH THE CASE

1. JURISDICTIONAL QUESTIONS STILL BEFORE THE COURT OF APPEALS

Unlike the Buyers, Transamerica in its motion to dismiss the appeal did not question the timeliness of the Notice of Appeal nor the perfecting of the appeal. Like the Buyers' motion to dismiss, however, its motion failed to meet the requirements of Supreme Court Rule 7(c), as required by Rule 7(b) or 7(d), and Rule 7(e). Transamerica as its grounds for dismissal alleged failure to comply with Rule 5(b), and that the appeal was frivolous.

Transamerica's main objection under Rule 5(b), which begins at page 2, line 17, of its Memorandum, is that F. M. Cocke's Opening Brief, after laying a factual background, asserts at page 37 that the separation of F. M. Cocke's counterclaims, which sought to enforce the cancellation provisions against Buyers and Transamerica as joint defendants, into two separate and independant actions with separate judgments, violated due process of law.

Transamerica's main objection under its claim of frivolity was that the issues argued in the Opening Brief were res judicata, having been determined in the earlier appeal. In attempting to prove its point Transamerica listed seven questions framed by the Court in the earlier appeal and which were substituted for the questions actually presented by the earlier opening brief. Included in the actual questions presented but not met or ruled on as a result of the substitution were part of Question 2, and Questions 3, 4, 5, and 6 in their entirety, all of which, with the possible exception of Question 4, involve the effect or enforcement of the cancellation provisions 16-22 or 24.

At page 4, lines 13-20, of Transamerica's Memorandum in support of its Motion To Dismiss, Transamerica takes particular exception to statements made in F. M. Cocke's present Opening Brief in his argument on the effect of the cancellation provisions, which Transamerica states are not involved in the litigation. Transamerica also objects to the statements beginning on page 34 of the Opening Brief, because they assert that a final determination of the effect of the cancellation provisions cannot be made in the absence of either Transamerica or the Buyers. These statements are:

> In these circumstances, it became obvious four years ago that a final determination binding on F. M. Cocke and Buyers, of whether it was solely Buyers' failure to retract their new demands that put an end to the agreement by cancellation under paragraph 18 or by repudiation, could not be made in the absence of Transamerica, inasmuch as such cancellation or repudiation did not take place before March 18, 1969, and the escrow agent's letter approving Buyers' new demands was written March 10th.
>
> It was equally obvious that a final determination binding on F. M. Cocke and Transamerica, of whether Transamerica put an end under paragraph 24 to Buyers' rights under the agreement by the escrow agent's letter of March 10, 1969, could not be made in the absence of Buyers.

It is clear, therefore, that the issue of whether or not the trial court had

jurisdiction to separate the enforcement of the cancellation provisions into two separate and independent actions, and to proceed to separate and independent judgments, neither of which ruled on their effect, is before the Court of Appeals on Transamerica's Motion to Dismiss as well as on the Appeal itself.

In a determination by the Court of Appeals either on the Motion to Dismiss or on the Appeal itself of the jurisdictional issue pointed out in the preceding paragraph: if it be held that the trial court did not have jurisdiction to separate the enforcement of the cancellation provisions against Buyers and Transamerica into two separate and independent actions, and to proceed on to separate and independent judgments, then the judgment entered September 27, 1972, in favor of Buyers will be void for want of jurisdiction over Transamerica.

If it be held that the trial court did have jurisdiction to separate the enforcement of the cancellation provisions against Buyers and Transamerica into two separate and independent actions, and to proceed against each in the absence of the other on to separate and independent judgments, then the issue of whether Transamerica put an end to the agreement under paragraph 24, so putting an end to Buyers' claimed rights under the agreement, being before the Court of Appeals, can be determined in Buyers' absence.

Inasmuch as the issue of the validity of the judgment entered September 27, 1972, remains before the Court of Appeals, the trial court remains without jurisdiction to proceed with the enforcement thereof

pending final determination. Atkinson v. Atkinson (1965) 2 Ariz. App. 1, 405 P.2d 919.

III.

A SUBSTITUTE ESCROW AGENT TO ENFORCE THE ESCROW CONTRACT AS MODIFIED BY THE JUDGMENT ENTERED SEPTEMBER 27, 1972

1. NEW EVIDENCE ON THE MODIFICATION OF THE ESCROW CONTRACT

At page 2, lines 5-16, the Order to Show Cause orders Transamerica to appear on September 14, 1973, and show cause:

WHY, IN THE EVENT OF TRANSAMERICA'S INABILITY OR UNWILLINGNESS TO PROCEED WITH THE CLOSING OF THE ESCROW AS MAY BE DIRECTED BY THE TRIAL COURT, SUCH COURT SHOULD NOT APPOINT AS AN OFFICER OF SUCH COURT A SUBSTITUTE ESCROW AGENT TO ACT IN ACCORDANCE WITH THE ESCROW CONTRACT AS MODIFIED BY THE JUDGMENT ENTERED SEPTEMBER 27, 1972, AND BE SUBSTITUTED WITH ALL OF TRANSAMERICA'S RIGHTS, PRIVILEGES, AND DUTIES.

At page 2, lines 11-15, the Order to Show Cause, by reference to "the contract entered into on October 9, 1969 . . . as modified by the judgment entered September 27, 1972", recognizes and so admits that the escrow agreement was, as a matter of fact, modified by the judgment. Buyers' Application recognizes or asserts such modification of the "contract and escrow instructions" twice at page 8, line 28, to page 9, line 1, again at page 9, lines 27-28, at page 10, lines 5-7 and 25-27, and at page 11, lines 24-26. Among other Exhibits, Buyers have attached to their Application a copy of the judgment entered

September 27, 1972, which in the last clause, beginning at page 8, line 28, refers to the "terms of said contract as modified hereby."

In Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318 (1967) the court pointed out:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Coop., Inc. v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

Manifestly, Buyers in their Application and the trial court judge in his Order To Show Cause now recognize or assert, and so admit, that the modification of the contract entered into by the parties is an integral and decisive part of the judgment of September 27, 1972, in favor of Buyers. In the light of these later admissions, the true meaning and intended effect of the tiny clause at the very end of the judgment itself, "as modified hereby," now stands revealed. Such modification was and is beyond the power or jurisdiction of the court, and the judgment entered September 27, 1972,

was and is therefore void on its face, and the Order To Show Cause is without basis. Goodman v. Newzona, supra.

2. THE PROPOSED SUBSTITUTE ESCROW AGENT

There is no provision in the escrow agreement which authorizes the appointment of a substitute escrow agent by Buyers or by Transamerica or by their joint action. Nor is there any provision in the law which authorizes the trial court judge to modify the agreement by adding such a provision. Goodman v. Newzona, supra.

Further, where a defendant escrow agent is under the jurisdiction of the Court of Appeals, awaiting the determination of issues as to whether the escrow is to be closed or cancelled, the trial court is without jurisdiction to appoint a substitute escrow agent with authority to close the escrow. Following perfecting of an appeal, the trial court loses jurisdiction of matters connected with the case, except in furtherance of the Appeal. Atkinson v. Atkinson, supra.

It should not be overlooked that fine print paragraph 43 provides, simply and effectively:

> "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

Manifestly, the escrow cannot be closed by any escrow agent, until the title policies are issued. Transamerica has remained unwilling to issue its title policy on Parcel 2 since March 20, 1969 (p. 20 of Opening Brief), and has remained unwilling to

issue its title policy on Parcel 1 since February 27, 1970 (Deposition of Henry Kavanaugh, escrow officer, questioned by Transamerica's attorney, February 27, 1970, p. 42).

As this Court pointed out in Higgins v. Kittleson (1965) 1 Ariz. App. 244, 401 P.2d 412:

> The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).
>
> (emphasis added)

Clearly, if the deeds are delivered in violation of the terms of deposit, the depositors of the deeds can retake the land.

3. THE CONDITIONAL JUDGMENT ENTERED ON SEPTEMBER 27, 1972

It should be noted that the judgment entered on September 27, 1972, in favor of

Buyers contains the following order, quoted in Buyers' Memorandum at page 4, lines 19½-21½, and in the attached copy of the judgment at page 8, lines 19-23, thereof:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contracts, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;
>
> (emphasis added)

The trial court here ordered, adjudged and decreed that F. M. Cocke is to perform only upon compliance by Buyers with the terms of "said contract". As said in the previous paragraph of the judgment, this is the contract dated October 9, 1968, not September 27, 1972.

IV.

CONCLUSION

Buyers' attempt to now subject Transamerica, or other escrow agent, to jurisdiction of the trial court has come four years and a multitude of proceedings too late, and serves merely to admit that Transamerica is a real party in interest, and so to admit the fatal lack of jurisdiction of the trial court over Buyers' action for specific performance, because of Buyers' failure to join Transamerica.

As pointed out by Mosher v. Hiner, supra, Transamerica cannot be bound by the judgment since it was not joined in the action and was not a party to the

proceedings therein.

It is manifest that Buyers' Motion for an order referring the file should be denied.

Respectfully submitted this 13th day of September, 1973.

/s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.

COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY Superior Court No. C-222472 F. M. COCKE'S MOTION FOR FINDINGS OF GROUNDS UPON WHICH HIS NOTICE OF APPEAL AS TO BUYERS WAS HELD TO BE UNTIMELY IN ITS ENTIRETY Filed: September 19, 1973

Appellant F. M. Cocke respectfully moves the Court for a specific finding of the grounds upon which his Notice of Appeal from the judgments and orders as to appellees James Stewart Co. and the Hornes, herein called the Buyers, was held by the Order of May 17, 1973, to be untimely in its entirety, and for such other relief as the Court deems meet and just, for the reasons set forth below.

STATEMENT OF FACTS

1. Buyers in their Motion to Dismiss advanced several different theories in

support of their contention that the Notice of Appeal was untimely, but there was no finding in the Order of May 17, 1973, as to which of these if any was, or were, adopted by the Court.

Buyers in their Motion contended beginning at page 2, line 18, that F. M. Cocke's Motion to Vacate did not qualify as a motion to alter or amend under Rule 59(1), so as to extend the time limit for a notice of appeal from the judgments, under Rule 73(b)2iii, as amended.

At page 2, lines 18-28, Buyers suggested the Motion to Vacate was itself untimely, and correctly showed that it was filed October 10, 1972, thirteen days after September 27, 1972. Buyers did not mention that ten days after September 27, 1972, fell on a Saturday, nor that the following Monday was a court holiday. At page 3, lines 12-18, Buyers suggested that the Motion to Vacate did not assert a defense on the merits by claiming that in each and every paragraph thereof it sought to have the court vacate the judgment and declare the same void for lack of jurisdiction.

The Motion to Vacate, filed October 10, 1972, is in Vol. XI of the Abstract, at pages 954-987. Buyers' Response thereto, filed October 12, 1972, is at pages 988 and 989, and Transamerica's Response, filed October 24, 1972, is at pages 990-992. F. M. Cocke's Reply to these responses, filed November 7, 1972, is at pages 993-1000.

The trial court's minute order of November 6, 1972, denying F. M. Cocke's Motion to Vacate, and the minute order

of November 8, 1972, acknowledging receipt of F. M. Cocke's Reply, stating the court had reviewed the "Response" and its ruling of November 6, 1972, and reaffirming its ruling of November 6, 1972, are the last two minute entires in Vol. XIII of the Abstract.

In the Court of Appeals, Buyers' Motion to Dismiss revealed no attempt to comply with the mandatory provisions of Supreme Court Rule 7. There was no certificate, as required by Rule 7(c)1, of the clerk of the superior court certifying, nor did Buyers otherwise mention, that the Orders of November 6 and 8, 1972, were appealed from. Both such orders were designated by the Notice of Appeal (Vol. XI, p. 1008 of Abstract).

In F. M. Cocke's Reply to Buyers' motion to dismiss the appeal, at page 4, line 15, he called the court's attention to its holding in Secrist v. State of Arizona (1965) 2 Ariz. App. 240, 407 P.2d 781, that a motion filed on 27 April, 1959, by the Attorney General of Arizona, to vacate on jurisdictional grounds an adverse judgment entered 2 July, 1947, and which motion also asserted a valid defense, was a valid motion, appealable within the meaning of Rule 73(b) and Section 12-2101 ARS.

In his Motion For Rehearing, F. M. Cocke at page 3, line 23½, again pointed to the Secrist case, and at page 4, line 3, to Preston v. Denkins (1963) 94 Ariz. 214, 382 P.2d 686, in which the Arizona Supreme Court, sitting en banc, in a unanimous decision held that the right to challenge a judgment on the ground that it is void for lack of jurisdiction

of the parties does not depend upon rules of court or statute, that a judgment void for lack of jurisdiction may be set aside by means of a motion to vacate, and that an order setting aside an entire judgment as void does not leave the judgment valid as against defendants not properly before the Court on the motion to vacate.

MEMORANDUM OF POINTS AND AUTHORITIES, AND ARGUMENT

The right under the due process clause of the 14th Amendment to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence and have judicial findings based upon it. 16 AmJur 2d 984, Constitutional Law, Section 579, citing Baltimore and Ohio R. Co. v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S.Ct. 797; Butler v. State, 217 Miss. 40, 63 So. 2d 779.

In State of Washington ex rel. Oregon Railroad and Navigation Co. v. Fairchild, 224 U.S. 510, 56 L.ed 863, 32 S.Ct. 535, the court said:

> This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony, or of deciding upon pure questions of fact, but, as said in Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U.S. 591, ante. 565, 32 Sup. Ct. Rep. 320, from an inspection of the "entire record including the evidence, if properly incorporated therein, to determine whether what purports to be a

> finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."
>
> (emphasis added)

Where the question of jurisdiction is one of law, a court cannot by an erroneous decision acquire jurisdiction which it has not, or divest itself of jurisdiction which it has. 21 CJS, Courts, Section 115.

The Court of Appeals, Division 2, in In Re Estate of Henry (1967), 6 Ariz. App. 183, 430 P.2d 937, quoted and followed Bernstein, "The Disposition of Civil Appeals in the Supreme Court," 5 Ariz. L. Rev. 175-192 (Spring 1964):

> If counsel believes that grounds exist for dismissing an appeal, he should assume the affirmative burden of demonstrating that to the Court by motion. A motion to dismiss must be presented in writing. Rules 4 and 7 of the Rules of the Supreme Court (17 A.R.S.) prescribe in detail the form of the motion, the number of copies, the notation of service, the time for the response, as well as the other formal requirements. These requirements should be followed explicitly. They insure that the parties have a full opportunity to present to the Court, and that the Court has before it, all applicable facts and arguments. A motion which has such final and serious consequences as one to

> dismiss an appeal should not be presented or decided perfunctorily. (Emphasis added by Court)

In the instant case, the applicable fact of the appeal from the Orders of November 6 and 8, 1972, and therefore its dismissal, were not before the Court on Buyers' Motion to Dismiss, inasmuch as no mention of the appeal or of its dismissal was made by either the Motion or by a certificate of the clerk of the superior court.

In Caruso v. Superior Court In And For County of Pima (1966) 100 Ariz. 167, 412 P.2d 463, the court said:

> Acts in excess of jurisdiction include acts exceeding the power of the court as defined by constitution, statute or court rules followed under the doctrine of stare decisis, Abelleira v. District Court, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715 approved in Duncan v. Truman, 74 Ariz. 328, 248 P.2d 879, and acts where the lower tribunal has abused its discretion. Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764, 73 A.L.R.2d 1; State ex rel Rohan v. Superior Court, 95 Ariz. 319, 390 P.2d 109.

In the Abelleira case (1941) the California Supreme Court said:

> Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.

But in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations. For the purpose of determining the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, through the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has not "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structures of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional.

In our own recent decision, Rohan v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, 112, we said: '. . . some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to

> the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess.'
>
> (emphasis added)

In the instant case the prescribed procedure was prescribed by Supreme Court Rule 7.

In Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U.S. 603, 19 S.Ct. 761, 43 L.ed 1103, the court said (L.ed, p. 1105):

> As was said in Thompson v. Hatch, 3 Pick. 512: "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case . . . .The courts may rescind or repeal their rules, without doubt; or in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."
>
> (emphasis added)

Obviously, it does not lie within the power of the parties to free the court from the binding effect of existing and mandatory rules.

A court is bound to take notice of the limits of its authority; and it is its right and duty to make a preliminary examination of its jurisdiction to entertain the cause, of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel. If the court finds at any stage of the proceedings that it is without jurisdiction, it is its duty to take proper notice of the defect by staying the proceedings, dismissing, or other appropriate action. These rules apply irrespective of the wishes of the parties, or either of them. 21 CJS, Courts, Section 114.

Courts exercising appellate jurisdiction will examine into their power to entertain the matter before them even in the absence of an issue being raised by counsel. Stevens v. Mehagian's Home Furnishings, Inc., 90 Ariz. 42, 365 P.2d 208 (1961); Ginn V. Superior Court, 1 Ariz. App. 455, 404 P.2d 721 (1965); Searles v. Haldeman, 3 Ariz. App. 294, 413 P.2d 860 (1966).

In Thompson v. Whitman, 85 U.S. 457, 21 L.ed 897, the court said:

> Thus, in Elliott v. Peirsol, 1 Pet., 328, 340, it was held that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: Where a court

> has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.
>
> (emphasis added)

The authority to entertain motions to dismiss having been granted by Rules 4 and 7, the Court remains without authority to entertain such motions except upon the terms and conditions therein specified.

Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void, not voidable, even prior to reversal, whether the lack of jurisdiction appears on the face of the record or by proof outside of it; likewise, a court's acts in excess of its jurisdiction are void, even if it has jurisdiction of the subject matter of the action and of the parties, as where a court of special or limited jurisdiction exceeds its powers. 21 CJS, Courts, Section 116. The jurisdiction of the Court to entertain motions to dismiss is plainly limited to motions that meet the mandatory provisions of Rule 7.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S.Ct. 236, the court said, quoting Scott v. McNeal, 154 U.S. 34, 46, 38 L.ed 896, 901, 14 S.Ct. 1108:

> No judgment of a court is due process of law, if rendered without the jurisdiction in the court, . . .

Truax v. Corrigan, 257 U.S. 312, 66 L.ed 254, 42 S.Ct. 124, quoted and followed Barbier v. Connelly, 113 U.S. 27, 28 L.ed 923, 5 S.Ct. 357, in which the court said:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, . . .that all person. . .should have <u>like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts</u>; . . .
>
> (emphasis added)

In Lindus v. Northern Insurance Co. of New York, Reh. Den. 1968, 103 Ariz. 160, 438 P.2d 311, the court said:

> We believe, however, that the proper criterion to be considered in determining whether to recall a mandate was succinctly expressed by the Supreme Court of the United States in the United States v. Ohio Power Co., 353 U.S. 98, 99, 77 S.Ct. 652, 653, 1 L.ed.2d 683, where it is stated: ". . .the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."

> Of course where there has been either fraud, imposition, or mistake of fact, the court can always recall a mandate to modify or correct its own judgment. Overson v. Martin, 90 Ariz. 151, 367 P.2d 203.

CONCLUSION

It is clear that Buyers' Motion to Dismiss placed before the Court the question whether F. M. Cocke's Notice of Appeal from the Judgments was timely. This question made necessary the determination (1) whether the Motion to Vacate was timely, and (2) whether it qualified as a motion to alter or amend under Rule 59(1), so as to extend the time limit for a notice of appeal from the judgments.

It is equally clear that Buyers' Motion to Dismiss did not place before the Court the question (3) whether F. M. Cocke's Notice of Appeal from the Orders of November 6 and 8, 1972, denying his Motion to Vacate was timely, but that Buyers' Motion to Dismiss did place before the Court, although somewhat obliquely, the question (4) whether F. M. Cocke's Motion to Vacate asserted a valid defense on the merits.

The Court of Appeals Order of May 17, 1973, found only that F. M. Cocke's Notice of Appeal was untimely in its entirety as to appellees James Stewart Co. and the Hornes.

The questions whether (5) Secrist v. State of Arizona, supra, and (6) Preston v. Denkins, supra, are controlling as to F. M. Cocke's Motion to Vacate were

raised in his Reply and Motion For Rehearing.

Upon the above facts and law it appears that appellant is entitled as a matter of due process to findings on the questions listed above, and to such other relief as the Court deems meet and just.

Respectfully submitted this
19th day of September, 1973.

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY Superior Court No. C-222472 MEMORANDUM IN OPPOSITION TO F. M. COCKE'S MOTION FOR FINDINGS OF GROUNDS UPON WHICH HIS NOTICE OF APPEAL AS TO BUYERS WAS HELD TO BE UNTIMELY IN ITS ENTIRETY Filed: September 21, 1973

Appellant, F. M. Cocke, has filed a motion requesting this Court to make a specific finding "of the grounds upon which his Notice of Appeal from the judgments and orders as to appellees James Stewart Co. and the Hornes, ... Buyers, was held by the Order of May 17, 1973, to be untimely in its entirety, and for such other relief as the Court deems meet and just, ..." This is a memorandum in opposition to that motion. For the reasons set forth below, the appellees maintain that the motion must be summarily denied.

On May 17, 1973, this Court entered an order in response to a motion filed by appellees James Stewart Co. and the Hornes to dismiss the appeal of F. M. Cocke against them on the grounds that it was not timely perfected. That order provided, in part, as follows:

> "It appearing to the Court that the appellant's notice of appeal from the judgments and orders as to appellees Horne and James Stewart Co. is untimely,
>
> "IT IS ORDERED dismissing appellant's appeal in its entirety as to appellees Horne and James Stewart Co."

Section 12-120.24, A.R.S., provides, in part, as follows:

> "A party ... against whom a motion for dismissal of the action has been granted in the court of appeals may file in such court a motion for rehearing after the rendition of the ... order of dismissal, setting forth with particularity the reasons why he believes the ... order of dismissal erroneous.... If the motion is denied, and the party against whom the ... order has been rendered desires a further review by the supreme court, he shall serve upon the opposite party and file with the clerk of the division a statement that he desires such review.... If no request for review by the supreme court has been filed, ... the clerk of the division shall, ... issue the mandate of the court of appeals, ...

by certified copy of the order of the court."

Following the dismissal of the appeal of F. M. Cocke against Stewart and Horne, the appellant filed a timely motion for rehearing as to the Court's order dated May 17, 1973. On June 13, 1973, the Court denied the appellant's motion for rehearing. The appellant did not file a petition for review with the Supreme Court following the denial of the motion for rehearing as provided by Rule 47(b) of the Rules of the Court of Appeals, and therefore, on July 5, 1973, the Court entered its order dismissing the cross-appeal of Stewart and Horne pursuant to its order of June 13, 1973.

Based upon the foregoing, the instant motion should be summarily denied. Stewart and Horne submit that the appeal of F. M. Cocke is not concluded. This follows from the denial of his motion for a rehearing on June 13, 1973, and his failure to file a petition for review with the Supreme Court. If appellant wanted to pursue this matter further, he need only to have filed a timely petition for review. Having not done so, Stewart and Horne submit that this Court is without further jurisdiction other than the issuance of its mandate referring the case back to the Superior Court.

Moreover, the motion of Cocke should be dismissed as unmeritorious. An order of this Court is not a decision as requires publication setting forth the specific findings and reasons upon which the appeal was dismissed. Cf. McRae v. Forren, 428 P.2d 129 (1967).

It follows that F. M. Cocke's motion

for findings of grounds upon which his notice of appeal as to buyers was held to be untimely in its entirety should be summarily denied.

Respectfully submitted,

KELLY AND CORBIN

/s/ Hubert E. Kelly
Hubert E. Kelly
Attorneys for Appellees
James Stewart Co., an Arizona corporation, M. Seth Horne and Maurine D. Horne, his wife

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C-222472
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	O-R-D-E-R Filed: October 2, 1973

The motion to dismiss appeal filed by appellee Transamerica Title Insurance Company, its request for assessment of attorney's fees and costs on appeal and the response thereto have been considered by Judges Donofrio, Ogg and Stevens. In addition, the "motion to refer file pertaining to James Stewart, an Arizona corporation, M. Seth Horne and Maurine D.

Horne, his wife, back to Maricopa County Superior Court" and the reply thereto have also been considered. It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title is frivolous.

IT IS ORDERED granting Transamerica Title Insurance Company of Arizona's motion, and the appeal is hereby dismissed.

IT IS FURTHER ORDERED that it is the opinion of the Court that the appeal is frivolous. Nevertheless, the Court declines to impose sanctions authorized by A.R.S. §12-2106.

IT IS FURTHER ORDERED denying the motion of Stewart and Horne to refer portions of the file back to the Maricopa County Superior Court.

/s/ Francis J. Donofrio
FRANCIS M. DONOFRIO,
Presiding Judge, Department A

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

F. M. COCKE'S MOTION TO SET ASIDE ORDER OF OCTOBER 31, 1973, GRANTING APPLICATION FOR WRIT OF ASSISTANCE, ETC.
Filed: November 9, 1973

Defendant F. M. Cocke respectfully moves the Court to set aside the Order, dated October 31, 1973, Granting Application For Writ Of Assistance, or, Alternatively, Requiring Compliance With Judgment Dated September 27, 1972, Or For A Supplemental Bill Enforcing Said Judgment, upon the following grounds:

I.

ORDER TO SHOW CAUSE, AND HEARING, PREMATURE

It appears that plaintiff's Application For Writ Of Assistance, etc., was filed, and the Order To Show Cause signed, in the trial court on September 7, 1973. On September 10, 1973, Appellees James Stewart Company, M. Seth Horne and Maurine D. Horne filed in the Court of Appeals their Motion to Refer File pertaining to them back to Superior Court. This motion evidenced appellees' admission that jurisdiction remained in the appellate court, along with the record. F. M. Cocke's Reply to Buyers' Motion to Refer (copy attached as Exhibit A) was filed September

13, 1973. On October 2, 1973, the appellate court exercised jurisdiction by denying appellees' Motion to Refer File, and granted Transamerica's motion to dismiss as to Transamerica.

It also appears that the only hearing held on plaintiff's Application For Writ, etc., was held October 12, 1973, pursuant to the Order to Show Cause issued September 7, 1973.

Under Supreme Court Rule 9(a), F. M. Cocke was allowed 15 days from October 2, 1973, to file a motion for rehearing on the order dismissing his appeal as to Transamerica. Throughout such time period the appellate court then retained jurisdiction over the issues raised by Transamerica in its Motion to Dismiss. Copies of such motion and of F. M. Cocke's Reply thereto are attached as Exhibit B. These issues included the issue of whether the trial court had jurisdiction to separate the enforcement of the cancellation provisions, sought by F. M. Cocke's counterclaim jointly and severally against Buyers and Transamerica, into two separate and independent actions, with separate and independent judgments. Neither of the judgments ruled on the effect of the cancellation provisions.

The issues of the validity of the September 27, 1972, judgment in favor of Buyers therefore remained within the jurisdiction of the appellate court until October 17, 1973.

The Order to Show Cause issued on September 7, 1973, and the hearing held pursuant thereto on October 12, 1973, were therefore premature, and not within

the power of the jurisdiction of the Court.

The file was not returned to the Superior Court until October 30, 1973.

Where the question of jurisdiction is one of law, a court cannot by erroneous decision acquire jurisdiction which it has not, or divest itself or jurisdiction which it has. 21 CJS, Courts, Section 115.

For the foregoing reasons defendant-counterclaimant F. M. Cocke respectfully requests that the Order entered October 31, 1973 be set aside.

Respectfully submitted this 9th day of November, 1973.

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
1450 E. University, Suite 200
Mesa, Arizona 85203
Attorney for Appellant
Francis M. Cocke

STATE OF ARIZONA)
: ss.
County of Maricopa)

F. M. COCKE being first duly sworn, on oath deposes and says:

That he is one of the defendants in the foregoing entitled and numbered cause; and that he has read the foregoing motion and knows the contents thereof, and that the matters and things stated therein are true of his own knowledge, except as to those matters therein specifically stated to be upon information and belief, and as

to those matters he believes them to be true.

/s/ Francis M. Cocke
FRANCIS M. COCKE

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

AMENDMENT TO F. M. COCKE'S MOTION TO SET ASIDE ORDER OF OCTOBER 31, 1973, GRANTING APPLICATION FOR WRIT OF ASSISTANCE, ETC.
Filed: November 13, 1973

Comes now defendant F. M. Cocke and hereby amends his Motion To Set Aside Order Of October 31, 1973, Granting Application For Writ Of Assistance, Etc., as follows:

At page 2, line 30, changing the word "of" to "or"; at page 3, line 5, changing the phrase "or jurisdiction" to "of jurisdiction"; at page 3, line 15, changing "Appellant" to "Defendant", and following page 3, line 9½, add the following:

Further, the proposed Writ of Assistance, Etc., could only issue against parties bound by the decree. Terrell v. Allison, 21 Wall (U.S.) 289, 22 L.ed 634; 6 Am Jur 2d, Assistance, Writ Of, Section 9. Transamerica was not a party to Buyers' action for specific performance.

Buyers' Application For Writ, Etc., and the Order To Show Cause, of September 7, 1973, and the Order of October 31, 1973, Granting Writ Of Assistance, Etc., established that on September 7 and October 31, 1973, the escrow agent, as holder of Sellers' deeds and Buyers' money and mortgages, was an indispensable party to

Buyers' action. Transamerica was therefore an indispensable party upon the filing of Buyers' Complaint For Specific Performance, on April 22, 1969.

Although Buyers attached a copy of the preliminary Agreement and escrow instructions to their Complaint, and demanded as part of the relief sought that the title policies be issued and the escrow be ordered closed, Buyers failed to join Transamerica under Rule 19 as amended, 16 ARS Rules of Civil Procedure. This left the Court without the power to grant the relief sought, and thus without jurisdiction to determine the rights of the parties, Terrell v. Allison, supra., or as stated by Rule 12(b), without jurisdiction over the subject matter. Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, cert. den. (1972) 406 U.S. 945. The judgment being void on the face of the judgment roll is void on its face. Arenas v. United States, 95 F. Supp. 962, affirmed (9th Cir. 1952) 197 F.2d 418.

The Order of October 31, 1973, took judicial notice that Transamerica was no longer willing to act as escrow agent and close the escrow as modified by the judgment of September 27, 1972, or in any manner act in connection with the said escrow or the closing thereof.

The fifth paragraph of Schedule "A" provides:

> These instructions and that certain Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale

of the property described under the terms set forth herein.

If any applicable and material term of the preliminary Agreement and escrow instructions was modified by the judgment, the judgment is to that extent void for want of jurisdiction. Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318.

The established unwillingness of Transamerica as escrow agent to comply with the escrow instructions and as title insurer to issue the title policies now requires the prompt return of Sellers' three deeds to the depositors thereof, as specified by the mandatory and self-executing terms of paragraph 24.

Respectfully submitted this 13th day of November, 1973.

/s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
1450 E. University, Suite 200
Mesa, Arizona 85203
Attorney for Defendant
Francis M. Cocke

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

PLAINTIFFS' RESPONSE TO F. M. COCKE'S MOTION TO SET ASIDE ORDER OF OCTOBER 31, 1973, GRANTING APPLICATION FOR WRIT OF ASSISTANCE, ETC., AND AMENDMENT THERETO
Filed: November 20, 1973

This is a memorandum in response to F. M. Cocke's Motion to Set Aside Order of October 31, 1973, granting the writ of assistance issued by the Court on that day, and his amendment to said motion filed on or about November 13, 1973.

The gravamen of the motion of F. M. Cocke is that the order to show cause, hearing and the resulting order and writ issued by the Court were untimely because the Court was without jurisdiction to do so. Plaintiffs submit that the motion of F. M. Cocke should be summarily denied for the following reasons.

First, F. M. Cocke was given adequate notice of the filing of plaintiffs' Application for Writ of Assistance, or, Alternatively, for an Order Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing Said Judgment, the Order to Show Cause issued by the Court on September 7, 1973, and the resulting hearings thereon. The file contains the affidavit of counsel to the effect that the Application for Writ of Assistance and the Order to Show Cause

were served on counsel for F. M. Cocke on September 7, 1973. Therefore, F. M. Cocke's failure to respond and his failure to appear at the hearing on the application constitute a default and he is in no standing at this particular time to move to set aside the order of October 31, 1973, and the writ of assistance issued pursuant thereto.

Secondly, the position of F. M. Cocke that the trial court exceeded its jurisdiction is wholly without grounds. The general rule is that the dismissal of an appeal leaves the decree of the subordinate court in effect. A dismissal is a final disposition of a case in the appellate court and deprives that court from further jurisdiction. 5 Am. Jur. 2d, Appeal and Error, Section 930. In addition, the perfecting of an appeal within the time prescribed is jurisdictional. Where the appeal is not timely filed, the appellate court acquires no jurisdiction other than that necessary to dismiss the appeal. Edwards v. Young, 486 P.2d 181, 182 (Ariz. 1971); Harbel Oil Co. v. Steele, 298 P.2d 789, 790 (Ariz. 1956).

Under the holding of the foregoing cases, plaintiffs submit that the appellate court, insofar as the appeal of F. M. Cocke related to them, never acquired juridiction, and therefore this court was at all times a jurisdictional forum for them to seek enforcement of the judgment of September 27, 1972. With regard to F. M. Cocke's appeal concerning counterdefendant, Transamerica Title Insurance Company of Arizona, there was no privity between that appeal and plaintiffs' case, and therefore in no way should it interfere with the order granted by the Court on October 31,

1973, giving plaintiffs the relief sought by the Application for Writ of Assistance.

For the foregoing reasons, it is respectfully submitted that the motion filed by F. M. Cocke to set aside the order of October 31, 1973, granting the Application for Writ of Assistance, and his amendment thereto, should be summarily denied.

Respectfully submitted,

KELLY AND CORBIN

/s/ Hubert E. Kelly
Hubert E. Kelly
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART CO.,an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE,his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	NO. C-222472 TRANSAMERICA TITLE'S RESPONSE TO F. M. COCKE'S MOTION TO SET ASIDE ORDER OF OCTOBER 31, 1973, GRANTING APPLICATION FOR WRIT OF ASSISTANCE, ETC., AND AMENDMENT THERETO Filed: November 29, 1973

F. M. Cocke's Motion essentially attacks the jurisdiction of this Court. Suffice it to say that this Court has jurisdiction by virtue of the fact that the real property involved in the litigation is in Maricopa County and by virtue of the fact that Mr. Cocke, the purchasers,

Transamerica Title and all parties involved have openly and willingly submitted themselves to the jurisdiction of this Court. It is Transamerica Title's position that this Court has had jurisdiction at all material times and does now have jurisdiction to enter the orders that have been entered herein.

Respectfully submitted,

BROWDER & GILLENWATER, P.C.

By /s/Powell B. Gillenwater
Powell B. Gillenwater
Attorneys for Transamerica Title Insurance Company of Arizona

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	NO. C-222472 F. M. COCKE'S REJOINDER TO BUYERS' AND TRANSAMERICA'S REPLIES TO HIS MOTION TO SET ASIDE ORDER AND WRIT AND F. M. COCKE'S MOTION FOR FINDINGS AND CONCLUSIONS Filed: December 3, 1973

Defendant-counterclaimant F. M. Cocke hereby submits his Rejoinder to the Replies of plaintiff Buyers and of Transamerica, and respectfully moves the court for findings of fact and conclusions of law on the questions set forth below concerning new or additional evidence

disclosed by the Application For Writ of Assistance, etc., filed September 7, 1973, by the Order Granting Writ and by the Writ itself, issued October 31, 1973, all of which were prepared by Buyers.

REJOINDER

Buyers' claim of default is without merit. The cases they cite in support of the general rule, and the general rule, are not controlling here. The case that controls this point is Cocke v. Buyers v. Transamerica, and the point was decided by Buyers and the Court of Appeals. Buyers as appellees submitted to the jurisdiction of the Court of Appeals, thereby acknowledging same, by filing on September 10, 1973, their Motion to Refer File. The Court of Appeals exercised its jurisdiction by denying Buyers' Motion on October 2, 1973, and also by dismissing F. M. Cocke's appeal. Buyers and F. M. Cocke each had until October 17 to file motions for rehearing, and the trial court could not affect the rights of either by proceedings held therein prior to that date, particularly where one did not choose to cast doubt on his rights in the appellate courts by appearing.

Transamerica in its Response has carefully refrained from stating that F. M. Cocke submitted to the jurisdiction of this Court before the record was returned. Significantly, the Order granting the Writ was not entered, nor the Writ issued, until after the record was returned.

Much more significant, however, is the new or additional evidence submitted to this Court by Buyers' Application For Writ, the Order Granting Application For Writ,

and the Writ itself.

MOTION FOR FINDINGS AND CONCLUSIONS

I.

GROUNDS AND REASONS

This motion is filed on the grounds and for the reasons that:

1. The jurisdiction of the court in the original cause is always open to question in the enforcement of a writ of assistance. Earle v. McVeigh, 91 U.S. 503, 23 L.ed 398; Howard v. Milwaukee, etc., R. Co., 101 U.S. 837, 25 L.ed 1081; Terrell v. Allison, 21 Wall. 289, 22 L.ed 634;

2. The alterations in the escrow instructions manifest in the Order and Writ of October 31, 1973, are beyond the power or jurisdiction of this Court. Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318 (1967). Inasmuch as neither the Order nor the Writ can exceed the judgment on which they are based, Terrell v. Allison, supra, either the judgment in favor of Buyers is, or the Order and Writ are, void because beyond the power or jurisdiction of this Court;

3. The right to enforcement of the mandatory and self-executing terms of cancellation paragraph 18 or 24 if justified by the evidence, Harrison v. Fortlage, 161 U.S. 57, 40 L.ed 616, 16 S.Ct. 488, and the right to present evidence that such enforcement is justified, and to have judicial findings upon such evidence as a matter of due process, Baltimore & Ohio Railroad Co. v. United States, 298 U.S. 349,

80 L.ed 1209, 56 S.Ct. 797, are rights secured by the United States Constitution and laws, Truax v. Corrigan, 257, U.S. 312, 66 L.ed 254, 42 S.Ct. 124;

4. The right to such enforcement depends on the evidence which sustains this Court's ruling that F. M. Cocke failed and refused to comply with the agreement and escrow instructions.

II.

NEW OR ADDITIONAL EVIDENCE

A. THE ENFORCEMENT OF PARAGRAPH 18.

Buyers' Application For Writ of Assistance, etc., at page 5, lines 1-8, states:

> 5. On November 27, 1972, plaintiffs, in compliance with the judgment, contract and Escrow No. 02013111-7, paid over to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, the sum of $32,000 representing the balance of the second installment of $64,000 due from plaintiffs on January 2, 1969, after offsetting against the interest therein of FRANCIS M. COCKE the sum of $32,000 for the damages and costs awarded plaintiffs against defendant FRANCIS M. COCKE as set forth in the judgment.

Attached to Buyers' Application as Exhibit "K" is Buyers' letter to Transamerica dated August 29, 1973, demanding compliance by Transamerica with the judgment in favor

of Buyers. The first complete paragraph on page 2 of such letter states:

> As you also know, in early January, 1973, representatives of the plaintiffs were in your office, at which time they conferred with Mr. Martin, to whom this escrow was then assigned. And, at that time the plaintiffs deposited with Transamerica Title additional funds which were then deemed necessary by the plaintiffs and the agent of Transamerica Title to comply with the terms of the contract and escrow involved in this case in the event Mr. Cocke's appeal was untimely, as it was ultimately decided to be.

These statements establish that on November 27, 1972, and in early January, 1973, Buyers and Transamerica agreed between themselves that Buyers had not yet complied with the agreement and escrow instructions of October 9, 1968.

By letter dated March 6, 1969, Transamerica notified Buyers that they "must comply with all of the terms of the escrow on or before March 19, 1969, . . .". Copies of such letter and the enclosed notice of cancellation signed on March 5, 1969, by F. M. Cocke are attached hereto as Exhibit A.

It is well settled that expressions by a party to an escrow agreement, particularly where still in the executory state, as here, of mere willingness and ability to comply are immaterial to the question of actual compliance. 28 Am Jr 2d, Escrow,

Sections 21, 22, 24; 30A CJS, Escrows, Sections 10(a) and 10(b).

QUESTION NO. 1

In the light of this new or additional evidence, and as a matter of fact and law, upon what specific grounds, if any there be, can it now be held that the escrow did not become cancelled upon close of business March 19, 1969, by the mandatory and self-executing terms of paragraph 18?

B. THE ENFORCEMENT OF PARAGRAPH 24.

Fine print paragraph 24 of the escrow instructions specifies that in the event of the inability or unwillingness of the escrow agent to comply with the instructions, or the unwillingness of Transamerica to issue a title policy, all documents executed by one party only, which includes the deeds, shall be returned to such party. The Order of October 31, 1973, at page 2, lines 5-13, establishes such unwillingness of the escrow agent to comply and such unwillingness of Transamerica to issue its title policy. By letter dated March 10, 1969, the escrow agent demonstrated its inability or unwillingness to comply with the escrow instructions by notifying Sellers that Buyer was in compliance therewith. It is now admitted that they were not in compliance on March 10, 1969. (See Enforcement of Paragraph 18, above.)

QUESTION NO. 2

In view of this new and additional evidence of the early and recent inability or unwillingness of the escrow agent to comply and of Transamerica to issue its

policy, and as a matter of fact and law, upon what specific grounds, if any there be, can it now be held that the trustee Bank's deed and F. M. Cocke's deeds should not be promptly returned to them in accordance with the mandatory and self-executing terms of paragraph 24?

C. ALTERATIONS IN PARAGRAPH 24.

Paragraphs 1 and 2 under I above are incorporated herein by this reference.

As pointed out in "B" just above, in the event of the unwillingness of the escrow agent and of Transamerica as specified by paragraph 24, the mandatory and self-executing terms specify that the deeds shall be returned to the party who executed same. The Order at page 5, line 27, to page 6, line 1, and the Writ at page 2, lines 16-26, order that, now that such unwillingness has been established, such deeds be delivered to Minnesota Title instead of to the trustee Bank and to F. M. Cocke.

QUESTION NO. 3

In view of the alteration of paragraph 24 ordered by the Order and Writ, and as a matter of law, upon what grounds, if any there be, can it now be held, since neither the Order nor the Writ can exceed the judgment, that none of such three documents is void on its face for lack of jurisdiction to alter the terms of paragraph 24?

D. TRANSAMERICA INDISPENSABLE.

On November 13, 1973, F. M. Cocke filed an Amendment to his earlier motion to set aside the Order. Such Amendment, from

page 1, line 30, to page 2, line 20, is hereby incorporated herein by this reference.

That portion of the Order which admits and so establishes that the relief sought by Buyers' Complaint of April 22, 1969, could not be granted in the absence of the escrow agent and title insurer is found at page 3, line 5, to page 4, line 12. The same admission is found in the Writ at page 2, lines 16-22.

QUESTION NO. 4

In view of this new evidence, additional to that appearing on the face of Buyers' Complaint, and as a matter of fact and law, upon what grounds, if any there be, can it now be held that Transamerica was not an indispensable party to Buyers' action for specific performance of the agreement, as holder of Sellers' deeds and Buyers' money and mortgages and as title insurer?

E. EVIDENCE OF F. M. COCKE'S FAILURE TO COMPLY AND REPUDIATION OF THE TRUSTEE BANK'S DEED.

The judgment in favor of Buyers is attached to the Writ of Assistance as Exhibit A. At page 4, lines 11-25, the judgment recites the failure and refusal of F. M. Cocke to perform the duties assumed by him in the agreement and escrow instructions. At page 5, line 25, to page 6, line 10, the judgment repudiates the trustee Bank's deed to the trust half-interest in Parcel 1, and purportedly places on F. M. Cocke the burden of conveying all of Parcel 1 to Buyers. However, the instructions accompanying the deposit of the trustee Bank's

deed into escrow were accepted by all parties as part of the escrow instructions. It has never been disputed that F. M. Cocke's deeds were deposited into escrow by the broker on or about January 1, 1969, bearing the exact metes and bounds descriptions contained in the judgment, but subject to existing rights of way and easements and subject to the Notice of Lis Pendens filed in early 1966 by the State of Arizona in its eminent domain proceeding, which was pending throughout 1969. In view of the Lis Pendens, there was no basis whatsoever for Transamerica's announced unwillingness on March 20, 1969, to issue its title policy on Parcel 2 because of the $6.00 Triangle, so putting an end to the agreement under paragraph 24, unless already cancelled at close of business the day before under paragraph 18. It has never been disputed that the only objection to the deed to F. M. Cocke's Parcel 2 was Transamerica's objection, later abandoned, to the $6.00 Triangle. The metes and bounds descriptions in the judgment also admit that Buyers' demand, never retracted, for a warranty deed from F. M. Cocke and the trustee Bank to Parcels 1A and 2A, as a condition precedent to payment of the $64,000 represented by the unacceptable personal checks, constituted, without more, repudiation of the agreement.

QUESTION NO. 5

Other than his failure to join in the repudiation of the trustee Bank's deed and instructions, and as a matter of fact and law, upon what act or failure to act of F. M. Cocke did this Court rule that he failed to perform the duties assumed by him under the agreement and instructions of October 9, 1968?

Respectfully submitted this
3rd day of December, 1973.

/s/ L. Alton Riggs, Jr.

By: L. Alton Riggs, Jr.
1540 E. University, Suite 200
Mesa, Arizona 85203
Attorney for Defendant
Francis M. Cocke

(Hand-delivered July 29, 1974)

NOTICE

TO: THE SHERIFF OF MARICOPA COUNTY

RE: LAND IN POSSESSION OF F. M. COCKE

Arizona Revised Statutes Section 11-450 makes it clear that the letter dated July 11, 1974, dictated by Don Kenney and signed by Sgt. Carlson, did not discharge or excuse the Sheriff from liability for neglect or misconduct in any actual seizure of possession from F. M. Cocke by the deputies or in any formal placing of the land in the possession of C. W. Jackson Company. This company is not mentioned in the process served on F. M. Cocke or in the letter of July 11, 1974. The Kenney letter also falsely states that plaintiffs furnished warranty deeds from Minnesota Title and First National Bank of Arizona (See ARS 33-402).

This process included three documents: (1) the judgment entered in case C-222472 by Irwin S. Cantor on September 27, 1972, in favor of plaintiffs James Stewart Company, M. Seth Horne and Maurine D. Horne, (2) the Order Granting Writ of Assistance, etc., entered October 31, 1973, and (3) the Writ itself. Plaintiffs themselves have never been in possession, having since October 31, 1973, never obtained a further court order that they had complied with the contract and escrow instructions, which is the condition precedent to close of the escrow and seizure of possession expressly and repeatedly set forth in the Order and Writ.

It has long been settled, as pointed out in Schuster v. Merrill (1940) 56 Ariz. 114, 106 P.2d, that "ALL PROCESS AND ORDERS REGULAR ON THEIR FACE AND ISSUED BY COMPETENT AUTHORITY," contained in ARS Section 11-447, means process which is legal in form and contains nothing to notify or fairly apprise any one that it was issued without authority.

The long standing and fundamental rule as to modification of a contract by a court is well stated in Goodman v. Newzona Investment Co. (1966), 101 Ariz. 470, 421 P.2d 318:

> . . .It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Co-op, Inc. v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

The judgment beginning at page 8, line 24, states:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall

> serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said contract as modified hereby.

The Order beginning at page 2, line 5, points to the unwillingness of Transamerica to close the escrow in accordance with the contract and escrow instructions as modified by the judgment, or in any manner act in connection with said escrow or the closing thereof. Without more, this statement fairly apprises any one that Transamerica was unwilling to issue its title policy or close the escrow as modified.

Beginning at page 2, line 14, the Order states:

> IT FURTHER APPEARING to the Court that the TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, has indicated its willingness to be appointed pursuant to order of this Court to act for and in the place and stead of the defendant TRANSAMERICA TITLE CO. for the purpose of closing said Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the Second Amended Judgment entered and filed by this Court on September 27, 1972, and such

> instructions as are issued by the Court pursuant to this proceedings; and. . .

It is clear from this statement that the actual escrow agreement between the parties was rewritten into a completely new escrow agreement, with Minnesota Title as escrow agent.

The Order beginning at page 2, line 29, states that plaintiffs are entitled to have the escrow closed in accordance with the contract and escrow instructions as modified, not as entered into by the parties. Further, the Order refers to the actual agreement between the parties, as modified by the judgment or the Order at page 3, line 17, page 4, line 4, page 4, line 28, and at page 5, line 19.

Contradictory to all these references to the actual contract and escrow instructions as modified, is the following statement at page 3, lines 20-28, of the Order, specifying that the rights, privileges and duties of Minnesota Title are those, and only those, actually agreed to by the parties:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, be, and it is hereby, substituted as escrow agent with all of the rights, privileges and duties of the defendant TRANSAMERICA TITLE CO. for the purpose of proceeding with and closing Escrow No. 02013111-7, all as set forth in the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co.

as buyer and Francis M. Cocke
and Joan H. Cocke as sellers;
and. . .

Likewise the Writ of Assistance in its first paragraph states that plaintiffs were entitled to specific performance by F. M. Cocke (only one of the four principal parties) of the actual contract and escrow instructions entered into on October 9, 1968, but refers to such contract and escrow instructions as modified by the judgment and Order at page 2, line 6, page 2, line 25, and at page 2, line 31.

The condition precedent to close of escrow and any taking of possession by plaintiffs is repeatedly stated in the Order and Writ as compliance by plaintiffs with the contract and escrow instructions as modified by the judgment and Order, but the rights, privileges and duties of Minnesota Title to close the escrow are expressly limited by the Order at page 3, lines 20-28 (quoted hereinabove at page 3) to those set forth in the actual contract and escrow instructions. These contradictory specifications, without more, constitute sufficient warning that the judgment, Order and Writ modified the actual agreement of the parties without authority, and that any determination by the Sheriff that the limitation on Minnesota's powers is to be stricken or ignored has been made at his own risk.

Attached to this Notice are copies of Arizona Revised Statutes Sections 33-402, 11-450, and 11-447. Also attached are copies of Schuster v. Merrill, 36A Words and Phrases, Permanent Edition, "Regular On Its Face", Pankewicz v. Jess, quoted by Words and Phrases, and Goodman

v. Newzona, in part.

Dated this twenty-ninth day of July, 1974.

/s/ Francis M. Cocke
FRANCIS M. COCKE
1320 South Priest Road
Tempe, Arizona 85281
(602) 967-0734

STATE OF ARIZONA)
: ss.
County of Maricopa)

This instrument was acknowledged before me this 29th day of July, 1974, by FRANCIS M. COCKE.

In witness whereof I herewith set my hand and official seal.

/s/ Vera B. Arnold
Notary Public

My commission expires:

June 16, 1975

Letter from:

OFFICE OF THE MARICOPA COUNTY ATTORNEY

August 1, 1974

Kelly & Corbin
Attorneys at Law
3003 North Central
Suite 2300
Phoenix, Arizona 85012

Re: James Stewart Co. v. Cocke;
No. C-222472

Gentlemen:

Please be advised that this office represents the Maricopa County Sheriff's department as special counsel. The sheriff's office has requested that I review the Writ of Assistance signed by Judge Cantor on October 3, 1973, in the above case.

Mr. Cocke, the defendant in the above action, has gone to Sheriff Blubaum himself; Judge Boyd in Tempe; and has threatened the sheriff's office directly with civil suit if the sheriff's office proceeds to carry out the Writ of Assistance. Mr. Cocke claims that the condition precedent required of the plaintiff according to Judge Cantor's orders specifically commencing at line 27 on page two of the writ in question has not been complied with.

We have advised Mr. Cocke that it is not the function of the sheriff's office to ascertain or determine the validity of

the writ, however, in view of the above set forth condition precedent which is clearly on the face of the writ, the sheriff's office feels that they must have substantiation from your office that the condition required by the writ has been complied with. Further, we request that you furnish the sheriff's office a letter of indemnity along with the evidence that you furnish to substantiate the completion of the condition precedent. The sheriff's office will continue to keep the peace on the property in question but can do nothing further to enforce the writ until such time as they have the items requested herein. Would you please furnish the original of your indemnity letter and whatever evidence you might have to Lt. Pena, Civil Division, and send a copy to my office at 237 East Virginia, Phoenix, Arizona 85004. Should you have any questions, please do not hesitate to call me at 254-5311. Thank you.

Sincerely,

MOISE BERGER, COUNTY ATTORNEY

Donald J. Kenney
Special Counsel - Sheriff

DJK:mt

cc: Francis Cocke

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE; and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 ACCOUNT OF COURT-APPOINTED OFFICER; PETITION FOR APPROVAL AND APPLICATION FOR INSTRUCTIONS AND FOR DISTRIBUTIONS. Filed: August 7, 1974

Petitioner, TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, maintaining its offices at 3003 North Central Avenue, Phoenix, Arizona 85012, and the court-appointed officer pursuant to an order of this Court duly made and entered on October 31, 1973, which has acted and is acting pursuant to a Writ of Assistance issued by the above-entitled Court pursuant to said order of October 31, 1973, respectfully states unto the Court as follows:

1. Pursuant to the Writ of Assistance issued by the above-entitled Court commanding Petitioner to obtain possession of the files relating to TRANSAMERICA TITLE INSURANCE CO. Escrow No. 0201311-7, including all documents, deeds, deposits and instructions constituting the files of said escrow and proceed to close said escrow, your Petitioner obtained said files and proceeded with the closing of the escrow as commanded by the Writ of Assistance in accordance with the Contract and Escrow Instructions entered into on October 9, 1968 between JAMES STEWART CO., as buyer, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, as modified by the Judgment dated September 27, 1972, and the order dated October 31, 1973, granting the Application for Writ of Assistance, or, Alternatively, For An Order Requiring Compliance With Judgment Dated September 27, 1972, Or For A Supplemental Bill Enforcing Said Judgment; that said escrow was identified in Petitioner's office as Escrow No. 20-000,616.

2. In connection with the closing of said escrow, your Petitioner effected the transfer of legal title of the real property in question herein to the plaintiffs, subject to compliance by the plaintiffs with the aforesaid Contract and Escrow Instructions entered into on October 9, 1968, between JAMES STEWART CO., as buyer, and FRANCIS M. COCKE and JOAN H. COCKE. as sellers, as modified by the Judgment entered and filed by this Court on September 27, 1972 and the Order of October 31, 1973; that plaintiffs did comply with the aforesaid Contract and Escrow Instructions entered into on October 9, 1968 and your Petitioner closed the said escrow on December 20, 1973, at which time title to the real

estate, the subject of the Contract and Escrow Instructions entered into on October 9, 1968, was transferred to JAMES STEWART CO. and M. SETH HORNE and MAURINE D. HORNE, his wife; that attached hereto, marked Exhibit "A" and incorporated herein for reference is a copy of the Escrow Settlement Statement which reflects the charges against and credits to the plaintiffs herein as buyers and the charges against and credits to the said FRANCIS M. COCKE and JOAN H. COCKE, as sellers, according to their respective interests including, but not limited to, the receipt of funds paid outside of escrow by the plaintiffs, amounts transferred from the escrow opened by TRANSAMERICA TITLE INSURANCE COMPANY as No. 02013111-7; purchase money mortgages received from plaintiffs payable to FRANCIS M. COCKE and JOAN H. COCKE, according to their respective interests, costs and attorneys' fees charged against the interest of FRANCIS M. COCKE by TRANSAMERICA TITLE INSURANCE CO. per Judgment of this Court, damages due plaintiffs, together with interests and costs of suit in the aggregate amount of $52,054.58 due and owing pursuant to the Judgment in favor of the plaintiffs dated December 27, 1972, and an advance to FRANCIS M. COCKE on January 13, 1969 of $20,000.00 paid by TRANSAMERICA TITLE INSURANCE COMPANY; that your Petitioner also paid to ARLEIGH H. BURTON as a part of closing said escrow on behalf of FRANCIS M. COCKE and JOAN H. COCKE according to their respective interests, $10,000.00 of the total sum of $17,971.97 for the real estate commissions, including interest at six percent per annum as provided by said Contract and Esrow Instructions; that as a result of said closing, there remained a deficiency in closing

fees and costs against the interest of FRANCIS M. COCKE in the amount of $8,240.80; that in connection with the closing of said escrow, your Petitioner remitted to JOAN H. COCKE the sum of $21,210.84; that also in connection with said closing, your Petitioner granted two easements pursuant to the Contract and Escrow Instructions dated October 9, 1968, copies of which are attached hereto and marked Exhibits "B" and "C", respectively; that attached hereto and marked Exhibit "D" is a copy of the deed by which your Petitioner transferred legal title to the subject property to plaintiffs.

3. That the Contract and Escrow Instructions entered into between JAMES STEWART CO., as buyer, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, provided the buyer with the right and privilege to make additional payments to the unpaid balance of the purchase money mortgage at any time following January 2, 1969; that on July 1, 1974, plaintiffs prepaid the full amount of the unpaid balance of the purchase money mortgages received by your Petitioner on behalf of FRANCIS M. COCKE and JOAN H. COCKE, in connection with the closing of said escrow, i.e., $420,238.15, plus interest in the amount of $13,253.31, through July 1, 1974; that against the interest of FRANCIS M. COCKE in said proceeds, your Petitioner charged the shortage in closing fees and costs of $8,240.80, leaving the net received as a result of the prepayment by plaintiffs of $425,520.66.

4. On July 10, 1974, your Petitioner paid in full a mortgage due the Federal Land Bank Association, on the real estate the subject of the Contract and Escrow

Instructions entered into on October 9, 1968, in the sum of $34,802.88, for the purpose of clearing the title for the subject property to the plaintiffs; that with respect to the remaining proceeds, i.e., $390,447.78, your Petitioner has deposited substantially all of said proceeds in certificates of deposits, or pass book savings accounts according to the respective interests of FRANCIS M. COCKE and JOAN H. COCKE.

5. Attached hereto and marked Exhibits "E" and "F", and incorporated herein by reference, are copies of the escrow settlement documents reflecting the amounts due FRANCIS M. COCKE and JOAN H. COCKE as a result of the prepayment by plaintiffs on July 1, 1974, in the respective amounts of $278,216.02 and $94,259.79, together with the commission due ARLEIGH H. BURTON, charged against the respective interests of FRANCIS M. COCKE and JOAN H. COCKE.

6. In connection with the aforesaid prepayment, your Petitioner pursuant to the Writ of Assistance issued by this Court on October 31, 1973, executed on behalf of FRANCIS M. COCKE and JOAN H. COCKE, satisfaction of the mortgages given by plaintiffs at the initial closing of the escrow on December 20, 1973.

7. Pursuant to the Writ of Assistance, Or, Alternatively, Order Requiring Compliance With Judgment Dated December 27, 1972, Or Supplemental Bill Enforcing Said Judgment as issued out of this Court on October 31, 1973, your Petitioner has faithfully performed all things commanded of it by the above-entitled Court, including but not limited to obtaining the files relating to TRANSAMERICA TITLE CO. Escrow

No. 02013111-7, the closing of said escrow on December 20, 1973, the preparation of all documents and deeds necessary to effect the said closing, accounting for the fees and charges to and for the plaintiffs and FRANCIS M. COCKE and JOAN H. COCKE according to their respective interests, receiving and accounting for the payment in full on July 1, 1974 and depositing said proceeds, and your Petitioner now requests an order of the Court approving all acts and things done by it or taken by it for and on behalf of FRANCIS M. COCKE and JOAN H. COCKE, according to their respective interests and the further order of the Court providing for distribution of the proceeds to FRANCIS M. COCKE, JOAN H. COCKE and ARLEIGH R. BURTON, according to their respective interests.

WHEREFORE, your Petitioner prays for an order of the Court as follows:

1. Approving the closing of the escrow as alleged herein including but not limited to the following:

(a) The settlement of the escrow as reflected by Exhibit "A" attached hereto;

(b) The disbursement of proceeds of the sale to JOAN H. COCKE of $21,210.84;

(c) The easements granted under the Contract and Escrow Instructions dated October 9, 1968, copies of which are attached hereto as Exhibits "B" and "C";

(d) The deed executed by your Petitioner on behalf of FRANCIS M. COCKE, copy of which is attached hereto as Exhibit "E".

2. Approving the acceptance of the prepayment by the plaintiffs, JAMES STEWART CO. and SETH HORNE and MAURINE D. HORNE, and the satisfaction of mortgages in connection therewith;

3. Approving the deposit of funds received by your Petitioner in certificates of deposits and savings accounts pending distribution of same;

4. Approving all other acts and things done by your Petitioner on behalf of the sellers FRANCIS M. COCKE and JOAN H. COCKE in connection with the Contract and Escrow Instructions dated October 9, 1968, and the prepayment of the mortgages received from the buyers JAMES STEWART CO. and M. SETH HORNE and MAURINE D. HORNE, on September 20, 1973; and

5. For such other and further relief as to the Court may seem just, proper and necessary in the premises.

Respectfully submitted this 7th day of August, 1974.

KELLY AND CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE; and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorce man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	NO. C-222472 ORDER TO SHOW CAUSE Filed: August 7, 1974

THE STATE OF ARIZONA TO:

TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, by and through its attorneys, Powell B. Gillenwater, Browder and Gillenwater, 3003 North Central Avenue, Suite 2304, Phoenix, Arizona 85012

JOAN H. COCKE, by and through her attorney, Loretta Whitney, 603 Luhrs Building, Phoenix, Arizona 85003

DOROTHY H. COCKE and ELIZABETH C. COCKE, by and through their attorney, George Sorenson, Jr., 609 Luhrs Building, Phoenix, Arizona 85003

FRANCIS M. COCKE, by and through his attorney, L. Alton Riggs, Jr., 48 North MacDonald Street, Mesa, Arizona 85201, and FRANCIS M. COCKE, In Proper, 1320 South Priest Road, Tempe, Arizona,

G R E E T I N G S :

TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, having filed its verified Account of Court-Appointed officer; Petition for Approval and Application for Instructions and for Distributions, and the Court having read and considered said verified Petition, and good cause appearing therefor,

NOW THEREFORE, IT IS ORDERED that each of the above named parties be and appear in Division 7 of this Court on the 28th day of August, 1974, at the hour of 4:00 o'clock, P.M., then and there to show cause if any they may have why the relief prayed for in said Petition should not be granted.

DONE IN OPEN COURT this 7th day of August, 1974.

/s/ Irwin Cantor
Judge of the Superior Court

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, v. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 F. M. COCKE'S RESPONSE TO ORDER TO SHOW CAUSE AND MOTION TO VACATE OR SET ASIDE ORDER GRANTING WRIT OF ASSISTANCE, AND THE WRIT ITSELF Filed: August 28, 1974

Comes now Francis M. Cocke and responding to the Order to Show Cause entered August 7, 1974, moves the Court to vacate or set aside the Order Granting Writ of Assistance, etc., and the Writ itself, entered October 31, 1973, upon the following grounds.

1. The trial court hearing on issuance of the Order Granting Writ was held October 12, 1973, at which time jurisdiction remained in the Court of

Appeals, and the Order Granting Writ, and the Writ, were and are therefore void on the face of the record, and were and are without force or effect. The significant dates are as follows:

Sep. 7, 1973	Buyers filed Application to the Superior Court for Writ of Assistance, and said court entered its Order to Show Cause why the Writ should not be granted.
Sep.10, 1973	Buyers filed in the Arizona Court of Appeals their Motion to Refer File back to the Superior Court.
Oct. 2, 1973	Appellate court denied Buyers' Motion to Refer File, and granted Transamerica's motion to dismiss F. M. Cocke's appeal as to Transamerica, which involved Buyers' rights.
Oct.12, 1973	Hearing held in superior court on Buyers' Motion for Writ of Assistance. F. M. Cocke made no appearance, choosing not to so prejudice his rights in the appellate court.
Oct.17, 1973	Last day for Buyers to file in appelate court for rehearing on denial of their Motion to Refer File, and last day for F. M. Cocke to file

for rehearing in appellate court on dismissal of his appeal as to Transamerica.

Oct.30, 1973 Arizona Court of Appeals returned file to superior court.

Oct.31, 1973 Order Granting Writ of Assistance, stating that it was based on the Oct. 12, 1973 hearing, entered in trial court.

No hearing was held after jurisdiction was returned to the superior court. The entry of the Order Granting Writ, without a hearing within the jurisdiction of the Court, was wanting in due process of law.

2. The Order Granting Writ, and the Writ, were and are void on their faces, being in violation of ARS Title 6, Chapter 7, Section 6-811, and so beyond the power or jurisdiction of the Court, and such Order and Writ were and are without force or effect.

Section 6-811 specifies that the term "escrow agent" shall not include any person doing any of the acts specified in paragraph 1 of Section 6-801, which defines "Escrow", under the order of a court.

The Order Granting Writ, at page 3, lines 20-28, states that it is ordered that Title Insurance Company of Minnesota be, and it is hereby, substituted as escrow agent with all the rights, privileges and duties of Transamerica for the purpose of proceeding with and closing

the escrow, all as set forth in the escrow agreement entered into on October 9, 1968 (without modification). The entries of the Order Granting Writ on October 31, 1973, and the Writ, being beyond the power or jurisdiction of the Court, were wanting in due process of law.

3. The judgment entered September 27, 1972, and the Order Granting Writ, and the Writ, were served as purported process on F. M. Cocke by county sheriff's deputies on or about July 11, 1974. Each of these documents shows on its fact that it was entered in attempted enforcement of a contract as modified by such judgment or order, and such process was and is therefore void on its face and was wanting in due process of law, such modification not being within the province or power of the Court.

All three of the separate judgments entered in C-222472 against F. M. Cocke, in favor of Joan H. Cocke, Transamerica, and the Buyers, as well as the orders or judgments against him and in favor of Joan H. Cocke entered in case D-89833 subsequent to the final judgment of March, 1967 in that case, have been sought to be carried into execution by the C-222472 judgment entered September 27, 1972, in favor of the Buyers, and by the Order Granting Writ of Assistance, and the Writ itself, entered in C-222472 on October 31, 1973. The service of such three documents was in purported execution of such C-222472 and D-89833 judgments and orders, and the delivery thereof to the sheriff for execution was wanting in due process of law.

Such process recites at least ten

times that the contract sought to be enforced thereby has been modified by the judgment entered September 27, 1972 or the Order entered October 31, 1973, or both, so establishing such modifications, and that such process was and is therefore beyond the Court's jurisdiction and without force or effect, being void on its face, because on its face it is not subject to execution under ARS Section 11-447. It is the process itself which modifies the agreement entered into by the parties, and no court has authority to issue process which modifies a contract.

For the foregoing reasons this defendant respectfully moves this Honorable Court to vacate or set aside the Order Granting Writ of Assistance, etc., and the Writ itself, entered October 31, 1973.

Respectfully submitted this 28th day of August, 1974.

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
1540 East University, Suite 200
Mesa, Arizona 85203
Attorney for Defendant
Francis M. Cocke

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	NO. C-222472 NOTICE OF APPEAL TO COURT OF APPEALS, DIVISION I

Filed: November 27, 1974

Notice is hereby given that the above-named defendant-counter and cross claimant Francis M. Cocke appeals to the Court of Appeals of the State of Arizona from the following orders and judgments made and entered in the above entitled court in the above entitled action:

1. The Order Approving Account of Court-Appointed Officer and Petition for Approval and Application for Instructions and for Distributions entered September 30, 1974;

2. The Writ of Assistance, or, Alternatively, Order Requiring Compliance with Judgment Dated September 27, 1972, or Supplemental Bill Enforcing Said Judgment, entered October 31, 1973;

3. The Order Granting Application for Writ of Assistance, or, Alternatively, Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing Said Judgment, entered October 31, 1973;

4. The Second Amended Judgment in favor of plaintiffs and against counter-claimant Francis M. Cocke entered September 27, 1972, including Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law attached to said Judgment;

5. The Judgment in Favor of Cross-Defendant Joan H. Cocke and Against Cross-Claimant Francis M. Cocke, entered November 10, 1970;

6. The Summary Judgments in favor of counter-defendant Transamerica Title Insurance Company and against counter-claimant Francis M. Cocke entered November 10, 1970, and the Order Modifying said Judgment of November 10, 1970, and Judgment on Supersedeas and Cost Bonds, entered November 6, 1972; and

7. Each and every order merged in any of the above orders and judgments.

As bond for costs on appeal, a cashier's check in favor of the Clerk of the Superior Court in the amount of $250.00 is filed herewith.

While it might appear that the appeal of all judgments and orders included in numbered paragraphs 2 through 7 above at this time is untimely, said appeal should not be deemed to be untimely for the reason that the September 27, 1972, judgment which embodies and attempts to enforce all of the prior judgments is a conditional judgment and hence not a final judgment for the reasons more particularly set forth below. The last sentence of the September 27, 1972, judgment states:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said contract as modified hereby.
>
> (emphasis added)

As stated, the force and effect of said judgment on the interest in and title to the property is conditioned on the plaintiffs' compliance not with the actual contract made by the parties but by said contract as modified by the judgment.

The conditions were not complied with by plaintiffs as late as October 31, 1973, because the Order Granting Writ, entered on October 31, 1973, after finding that Transamerica was no longer willing to act in any manner in connection with the escrow as modified by the judgment, ordered Minnesota Title as an officer of the court to effectuate the closing of the escrow and the transfer of legal title to the plaintiffs, subject to compliance by the plaintiffs with the contract and escrow instructions as modified by the judgment entered on September 27, 1972, and said order.

The Writ of Assistance itself commanded Minnesota Title to obtain the escrow file from Transamerica and to proceed with the closing of the escrow in accordance with the contract and escrow instructions as modified by the judgment and the order.

Accordingly, it was not until September 30, 1974, that the lower court declared that the conditions required in the September 27, 1972, judgment had been met.

Respectfully submitted this 27th day of November, 1974.

/s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorney for Francis M. Cocke
231 North Alma School Road
Mesa, Arizona 85201